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Memorandum

To: Sheri L. Ward, Plum Creek Timber Co.

From: Steve Quarles
Tom Lundquist
Dan Wolff

CONFIDENTIAL

Date: September 18, 2006

Re: Scope of Cost-Share Road Easement

INTRODUCTION

In the 1960s, 70s, and 80s, the United States Forest Service ("Forest Service") entered into a series of rights-of-way construction and use agreements (collectively, "cost-share agreement") with Plum Creek's predecessors-in-interest – the Burlington Northern and Northern Pacific railroads ("railroads"). Under the terms of these agreements, the parties agreed to share the costs of constructing and maintaining certain roads running across their contiguous land holdings ("cost-share roads"). In conjunction with these cost-share agreements, and by authority of the Forest Roads and Trails Act of 1964 ("FRTA"), 16 U.S.C. § 532 *et seq.*, the Forest Service and railroads entered into separately agreed-to easement deeds under which they granted reciprocal easements over the segments of the cost-share roads running across their respective parcels (collectively, "FRTA easement").

The question presented is whether the FRTA easement granted to the railroads permits Plum Creek to use the cost-share roads for uses other than for hauling timber and forest management (*e.g.*, accessing residential property).

SHORT ANSWER

The most natural reading of the FRTA easement is that it permits access for uses other than hauling timber and forest management, including accessing residential property. There are several reasons for interpreting the easement in this manner.

First, the easement granting language contained in FRTA easement deeds is very general and subject to broad construction. The easement as written may not reasonably be limited to timber and forest management uses, a point that is highlighted when one contrasts a FRTA easement to other Forest Service easements that are more restrictive in scope.

Second, in enacting FRTA, Congress' goal was to enhance and fortify a multiple-use road system through the national forests, not merely to authorize a system of "logging roads" for narrow, static purposes. A broad interpretation is therefore consistent with what Congress intended.

Third, the United States may not unilaterally rescind or abridge the rights it previously granted. The FRTA easement deeds specifically stated that "no present or future administrative rules or regulations shall reduce the rights herein expressly granted."

Fourth, the suggestion made by certain Forest Service employees that a

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A. Except as hereinafter limited, Grantee shall have the right to use the road on the premises without cost *for all purposes deemed necessary or desirable by Grantee* in connection with the protection, administration, management, and *utilization of Grantee's lands or resources*, now or hereafter owned or controlled, subject to such traffic-control regulations and rules as Grantor may reasonably impose upon or require of other users of the road *without reducing the rights herein granted.****

Grantee's right to use the road shall include, *but shall not be limited to*, use for the purpose of operating and moving specialized logging vehicles and other equipment subject to the following limitations:

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B. Grantee shall comply with all applicable State and Federal laws, Executive Orders, and Federal rules and regulations, except that *no present or future administrative rules or regulations shall reduce the rights herein expressly granted.*

***

This easement is granted subject to the following reservations by Grantor, for itself, its permittees, contractors, and assignees:

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2. The right alone to extend rights and privileges for use of the premises ... to other users including members of the public *except users of lands or resources owned or controlled by Grantee or its successors*....

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(Emphasis added.) The easement deed also required maintenance costs to be shared by the parties proportionate to the respective uses of the road.

The cost-share agreement and easement deed – once executed – had independent validity. This fact was made clear in the language of the cost-share agreement, which stated that although that agreement could be terminated by either party after notice was given, "such termination shall in no way affect any ... right-of-way grant or easement deed that [illegible]

hereto prior to such notice...." Road Rights-of-Way Construction and Use Agreement, July 30, 1964, at 15.

In or around 1988, Plum Creek succeeded to the relevant property interests and by separate agreement with the Forest Service (dated June 2, 1988) was substituted as the party-in-interest to the existing cost-share agreements.

Over the years, the parties amended or supplemented t[redacted]

management. The position expressed by these Forest Service employees is contrary to the plain, broad language of the easement deeds, and is likely erroneous for the reasons expressed below.

No doubt logging vehicles were anticipated to be the primary vehicle type that would be used initially on the cost-share roads. But that is only because the best economical use of the private property at the time was timber harvesting. How Plum Creek or any other landowner chooses to use its land over time is generally not the Forest Service's concern, at least where the use is reasonable and does not interfere with any retained federal interest. So, for example, if Plum Creek believes that the best use of its property is as a company retreat or training facility, or even a residential subdivision, it would be perfectly consistent with the easement deed for Plum Creek to use the cost-share road under right of the existing easement to haul in building materials to construct such facilities, and to use the cost-share road thereafter to access the facilities. Such use would serve a "purpose[] deemed ... desirable" by Plum Creek "in connection with the ... utilization" of its lands.

If hauling timber were the only purpose for which the easement across national forest property was granted to the railroads, the easement deed could easily have been written to state as much (as FLPMA easements were written). Instead, the deed granted broad use rights, and the traditional interpretation of such broad language is that it creates "a general right of way capable of use in connection with the dominant tenement for all reasonable purposes." *Chevy Chase Land Co. v. United States*, 733 A.2d 1055, 1076 (Md. 1999) (citing 3 Herbert Thorndike Tiffany, *The Law of Real Property* § 803, at 322 (3d ed. 1939)).

Courts recognize that "[t]he manner in which the easement is used does not become frozen at the time of grant." *Wyoming v. Homar*, 798 P.2d 824, 826 (Wyo. 1990) ("Change was contemplated and must be accommodated in an advancing society."); *see also Camp Meeker Water System, Inc. v. Pub. Utilities Comm'n*, 799 P.2d 758, 866 (Cal. 1990) (holding that the "normal development of the dominant tenement" must be considered when interpreting the scope of an easement). The rule reflects common sense. Uses for land change over time; uses for easements – interests in land – are no different. *See* 1 Restatement (Third) of Property – Servitudes § 4.10 (2000) ("The manner, frequency, and intensity of the use may change over time ... to accommodate normal development of the dominant estate or enterprise benefited by the servitude."); *cf.* 5 Restatement (First) of Property §484 (1944) ("In ascertaining ... whether additional or different uses of the servient tenement required by changes in the character of the use of the dominant tenement are permitted, the interpreter is warranted in assuming that the parties ... contemplated a normal development of the use of the dominant tenement."). *See also* Thomas E. Atkinson, *et al.*, II American Law of Property (A. James Casner ed., Little, Brown & Co. 1952) § 8.65, at 278 (noting that parties are assumed to have contemplated not only the needs of the dominant estate at the time of the grant "but also its needs as measured by any development of it reasonably to be expected").

Therefore, "[w]hen the question whether ... a different use of a right-of-way or easement is presented, the court looks to the reasonableness of the use to determine its permissibility." *FDIC v. CAIA*, 830 F. Supp. 60, 66 (D.N.H. 1993). Generally, a

different use will fall outside the scope of a broadly worded easement only where it unduly burdens the servient estate (to an extent that could not reasonably have been anticipated). *See Mason v. Garrison*, 998 P.2d 531, 536 (Mont. 2000); *Chevy Chase*, 733 A.2d at 1074; Bruce and Ely § 8.12, at 8-35. No similar concern exists where the "use" – vehicle traffic – is of the same type as originally contemplated.

The court in *Cal-Neva Land & Timber Inc. v. United States*, 70 F. Supp. 2d 1151 (D. Ore. 1999), addressed a similar fact pattern. There, two private landowners granted the Bureau of Land Management ("BLM") "perpetual" easements "including, but not limited to the right and privilege to locate, construct, relocate, maintain, control, and repair a roadway." *Id.* at 1155-56. The BLM acknowledged that the original purpose in obtaining the easements was to gain access to BLM-controlled timber, but insisted that for the long-term the easements "could be used for a whole variety of purposes." *Id.* at 1155. The BLM therefore interpreted the easements as permitting use by the public (*e.g.*, to give hunters access to the public lands). *Id.* at 1156. The private landowners disagreed and sued to quiet title to the easement property.

The federal district court agreed with the BLM. Citing common law principles as reflected in Oregon case law, the court emphasized that "general principles of reasonableness control" the interpretation of an easement, and that absent any express or unequivocal restriction on the use of an easement, the rule is that the parties intended a broad use and enjoyment of the easement. *See id.* at 1157. There is, in the court's words, no need "for an affirmative recitation of every conceivable use that is allowed." *Id.* at 1158.

The *Cal-Nev* court found it instructive that the easement granting language was broad and unrestricted; it was relevant that the easement was not restricted, for example, for use as a logging roadway, or for grazing, fire protection, or mere administration of BLM lands. *Id.* The court pointed out that the reservation sections of the easement clearly indicated that the parties contemplated that the BLM would use the road containing the easement for logging activities, but emphasized that this did not mean logging was intended as the exclusive use. *Id.* It was also important to the court's interpretation of the easement that the BLM was granted control over the use of the road. *Id.*

A similar interpretation is due the FRTA cost-share easements at issue here. They are broadly worded ("for all purposes deemed necessary or desirable by Grantee in connection with the ... utilization of Grantee's lands") and not subject to any restrictions. And while hauling timber was certainly the predominant use contemplated for the cost-share roads at the time, the express allowance for the roads to be used for "all purposes" indicates in the [redacted]

shall include, *but shall not be limited to*," the operation of logging vehicles and the like (emphasis added).[3]

The reasoning employed in *Cal-Nev* applies with equal force to the situation here. Reading the easement deed as permitting the cost-share roads to be used only for hauling timber or forest management ignores the central, plain meaning of the words of conveyance.

B. Subsequent Revisions to the Forest Service's FRTA Easement Template and the Different Language Used in FLPMA Easements Reflects the Broader Scope of FRTA Easements.

Subsequent revisions made by the Forest Service to the FRTA easement deed template and the granting language used in the templates for easements issued by the Forest Service under FLPMA also shed light on the Forest Service's intent with respect to the scope of FRTA easements as originally conceived.

1. *1994 FRTA easement revisions.* In 1994, the Forest Service added a provision to the template for FRTA easements which reads:

> The rights herein conveyed do not include the right to use the road for access to developments used for short or long-term residential purposes, unless and until traffic control regulations, rules, and other provisions to accommodate such use of the road are agreed upon by the Grantor and Grantee.

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[3] It is also important that, subject to traffic-control regulations and other rules *reasonably* imposed, the easement deed expressly granted to the grantee the ability to "extend rights and privileges for use of the premises to ... users of lands or resources owned or controlled by Grantee or its successors." And even with respect to traffic-control regulations and other rules reasonably imposed, the deed made it clear that the provision applied "without reducing the rights herein granted."

With respect to *other* noncommercial users, the United States certainly possesses the authority under the easement deed to prohibit their use unless a provision is made for those third parties to bear a proportionate share of the road maintenance costs, but even that provision, fairly read, means only that the United States assumed the responsibility for limiting or mitigating costs not attributable either to itself or the grantee – the two parties otherwise responsible for the construction and upkeep of the cost-share roads. In effect, the Forest Service assumed control over such noncommercial users as a means of protecting the interests of the grantee. This provision is not implicated where the noncommercial user of the cost-share roads is a grantee or someone using the roads in some manner that is serving the grantee's property.

FSH 2709.12 § 31.2(I) (as amended, Sept. 29, 1994). This amendment demonstrates two things: (1) residential use was anticipated by the Forest Service; and (2) after the 1994 amendments (but not before), the Forest Service required that, for any easements granted from that time forward, any use of the easements for residential purposes would be contingent upon the parties first entering into a supplemental agreement regarding traffic control regulations and the like.

The 1994 amendments represented a departure from earlier easements granted under FRTA.[4] In amending the model template language for use in all prospective FRTA easements, the Forest Service was apparently interested in imposing tighter control over varied uses of the easement, a right not unlike that which it had always retained in easements granted under FLPMA (since that law's enactment in 1976). The fact that the Forest Service had not used that language in the earlier easement deeds strongly indicates that it did not consider the earlier easements to be subject to that greater level of control over residential use.

2. *FLPMA easement language.* FLPMA easements had always been more restrictive than FRTA easements, containing not only language that reflected a tighter control over residential uses but also language demonstrating that the easement was, in the first instance, "limited ... for" a much narrower, specified purpose: the "management and harvesting of the natural resources on the Grantee's land...." FSH 2709.12, Ch. 40, § 41.11(B), (D), and (F). In other words, FLPMA easements had always made it clear on their face that they were intended for a specific purpose (natural resources management and harvesting) whereas FRTA easements ("for all purposes deemed necessary or desirable by Grantee") had not. And FLPMA easements had always included an express prohibition on using the easements for residential purposes without further agreement between the parties on traffic control and the like.

Obviously, the Forest Service knew how to draft more restrictive easement language prior to 1994 – the model FLPMA easement language demonstrates as much. The absence of similar restrictive language in FRTA easement deeds is telling that the Forest Service intended to grant broader rights in FRTA easements.

The different purposes of these statutes – FRTA and FLPMA – help explain why the Forest Service would have granted broader rights under the former than it did under the latter. FRTA, as noted, has a *development* focus; it was intended to encourage the development of a comprehensive road system through the national forests to serve multiple uses. The Secretary of Agriculture was therefore affirmatively encouraged by Congress to grant, and did grant, broad easement rights.

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[4] Indeed, in FSH 5409.17 § 63.11(9) (as amended Sept. 12, 1994), the Forest Service acknowledges that the clause restricting residential access was not part of the cost-share program prior to 1994.

FLPMA, in contrast, has a *conservation and preservation* focus; it emphasizes that in the course of developing and managing public lands (as authorized by other laws), the protection of ecological values and habitat, *inter alia*, must remain a central consideration. *See* FLPMA § 102(a)(8), 43 U.S.C. § 1701(a)(8). Thus, whereas FRTA places no restrictions of its own on the terms of any easement granted thereunder, FLPMA requires that any easement authorized after its enactment (*except easements granted under FRTA*) be for specified purposes only and of limited duration. *See* FLPMA § 501(b)(1), 43 U.S.C. § 1761(b)(1) (requiring, prior to issuing easement, disclosure of plans and "other information reasonably related to the use, or intended use, of the right-of-way"); *id.* §504(b), 43 U.S.C. § 1764(b) ("Each right-of-way or permit granted, issued, or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project.").

But while FLPMA is, in essence, an overlay on other development-authorizing laws and regulations, it ***did not*** supersede or abrogate FRTA, any easement granted under FRTA, or the Secretary of Agriculture's authority to grant easements under FRTA. Thus, existing easements were not affected. *See* FLPMA § 509(a), 43 U.S.C. § 1769(a). Moreover, Congress expressly stated in FLPMA § 510(a), 43 U.S.C. § 1770(a), that "nothing in this subchapter shall be construed as affecting or modifying the provisions of [FRTA] ... and in the event of conflict with, or inconsistency between, this subchapter and [FRTA], the latter shall prevail." Congress further made it plain in FLPMA § 510(a) that nothing in FLPMA required the Secretary of Agriculture to henceforth grant easements only under FLPMA, or imposed any additional condition on the Secretary for easements thereafter granted under FRTA. *See id.*

In fulfillment of this legislative directive, the Forest Service maintains the dichotomy between FRTA easements and FLPMA easements. *See* FSM 2700 § 2733.03(2) (noting that agency policy is to grant easements under FRTA, not FLPMA, where applicable); FSH 2709.12, Ch. 40, § 41.1 ("Do not use a FLPMA easement in a cost-share agreement area in which the applicant is the cooperator [*i.e.*, landowner participating in cost-share road agreements under FRTA]."). The distinct purposes for the two laws must have been understood by the Forest Service, and supports the view that the Forest Service appreciated its authority under the earlier law to grant broader easement rights.[5]

[5] The Forest Service's change to its FRTA easement template language in 1994 cannot relate back to the earlier FRTA easements. The original easement deed made clear that no future rules or regulations could negate the easement rights granted.

II. Congress Intended To Facilitate an Enhanced Multiple-Use Road System in the National Forests, Not One Limited to Logging Uses.

Recognizing Plum Creek's right to use its easements to access its property for uses other than timber harvesting is consistent with Congress' vision for the national forest road system at the time it enacted FRTA. Through FRTA, Congress intended to foster the construction and maintenance of a national forest road system that was capable of meeting and serving the "increasing demands for timber, *recreation, and other uses of such lands....*" FRTA § 1, 16 U.S.C. § 532 (emphasis added). It deemed such a road system "essential ... to provide for intensive use, protection, development, and management of [Forest Service] lands under *principles of multiple use* and sustained yield of products and services." *Id.* (emphasis added).

The text of FRTA evinces the desire on the part of Congress to facilitate and enhance a multiple-use road system in the national forests; Congress certainly was not thinking *solely* about the promotion of timber [redacted]

cooperators. Congress was not satisfied with the existing system of special use permits. That regime frustrated the goal of developing a more functional national forest road system – namely, it prevented the United States from efficiently obtaining complete access rights of its own. The answer was easements – permanent, and unconditioned. And given the multiple purposes the national forest road system was expected to serve, Congress' intent would be undermined if the United States' "identical long-range management needs" – served as they are in part by the reciprocal and identically worded easements obtained from private landowners – were construed as extending no farther than to the United States' concern for timber harvesting and management. Congress certainly had a more elaborate vision for our national forest road system than a network of

land exchange with the United States sued the Government to quiet title to the deposits of caliche (a common, rock substance) found on his property. The BLM insisted that the United States owned the caliche pursuant to a mineral reservation to which the patent deed was subject. *See id.* at 677. The facts showed that at the time of the land exchange, and for a significant number of years thereafter, the landowner had no reason to know of BLM's view that the United States owned the caliche. *See id.* at 678. In fact, BLM itself came to the view that the United States owned the caliche – an abundant substance that, unlike oil or precious metals, one would not typically think of as coming within the scope of a "mineral" reservation – only after the land exchange had been executed, and even then only through internal policy discussion, not through discussions with the landowner. *Id.* at 679.

Focusing on the importance of "stability of titles," the Tenth Circuit rejected the Government's position that it could unilaterally decide it owned the caliche, holding that "[n]ew BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions." *Id.* at 683.

The Supreme Court, too, emphasized the special need for certainty in property law in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). There, the dispute was over whether the United States retained an easement by necessity across lands previously granted to the landowner's predecessor-in-interest under the Union Pacific Act of 1862, a law designed to promote and subsidize the construction of the transcontinental highway. A quiet title action was filed by the landowner in response to the Government's assertion of an easement and construction of a road intended to provide public access to recreational areas that were inaccessible except across the private land. *See id.* at 678. Pointing out that the law made no mention of a reserved easement, and that such was not "a matter of necessity" given the Government's right of eminent domain, *id.* at 679-80, the Court rejected the United States' position. It held: "This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to [illegible]

IV. The Initial Allocation of Costs Is Irrelevant to The Scope Of the Easement.

Finally, the notion that the scope of the FRTA easement is confined by the historical cost-share arrangements is unfounded. Congress authorized the Secretary of Agriculture to finance the construction and maintenance of national forest roads through, *inter alia*, cooperative financing with private parties. *See* FRTA § 4, 16 U.S.C. § 535. Congress further provided that maintenance costs were to be allocated "commensurate with the particular use requirements of each." *Id.* § 6, 16 U.S.C. § 537. The authority to grant easements was granted under a separate provision. *Id.* § 2, 16 U.S.C. § 533.

Here, the initial cost allocation under the cost-share agreement was premised

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To A L Richard/WO/USDAFS@FSNOTES
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Subject Fw: Plum Creek Easement

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cc "dwolff@crowell.com" <dwolff@crowell.com>
Subject Plum Creek Easement

Folks,

Attached for your information is the final of the easement amendment between Plum Creek and the Forest Service. We're beyond negotiations, but if you detect an error or omission, I'll be glad to discuss it with Dan Wolff. Thanks for everyone's help these many months in putting this together. We'll discuss implementation after next Tuesday.

Jim

James B. Snow
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Plum Creek Final Easement March 26 2008.DOC

Easement Amendment

THIS EASEMENT AMENDMENT is dated this _____ day of _____, 2008, by and between the **United States of America**, acting by and through the Department of Agriculture, Forest Service, Northern Region, hereinafter called "United States", and **Plum Creek Timberlands, L.P.**, a Delaware limited partnership, and **Plum Creek Land Company**, a Delaware corporation, each with offices at 999 Third Avenue, Suite 4300, Seattle, Washington, 98104.

Authority: The Act of October 13, 1964 ("National Forest Roads and Trails Act of 1964"); 16 U.S.C. §§ 532-538.

Definitions: As used herein:

The term "Prior Easements" means the easements referenced on the attached Exhibit A and incorporated herein as though fully set forth.

The terms "road" or "roads" mean the property rights conveyed by the Prior Easements as may be amended or supplemented herein; such road or roads are part of the National Forest Road System ("road system").

The term "Plum Creek" means Plum Creek Timberlands, L.P., Plum Creek Land Company, their subsidiaries, and/or their successors and assigns.

The term "Party" means either the United States, Plum Creek, or one of their respective successors or assigns, while the term "Parties" means the United States in addition to Plum Creek.

The term "person(s)" means any individual, partnership, limited partnership, corporation, association, organization, limited liability company, trust or other fiduciary arrangement, joint venture, cooperative, or any other type of entity, but does not include federal

The term "public road authority" means a federal, state, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities. *See* 23 U.S.C. § 101(23). For purposes of this easement amendment, the Forest Service is not considered a public road authority

system serving the intermingled real property of the parties. The road system was created by means of Road Right-of-Way Construction and Use Agreements, cost-share agreements, reciprocal easements, and similar agreements which provided for the construction, operation, maintenance of roads and road segments; and

WHEREAS, the reciprocal right-of-way agreements and easements were entered into under the authority of the Act of October 13, 1964 (78 Stat. 1089; 16 U.S.C. §§ 532-538); and

WHEREAS, the Parties desire and intend by this instrument to clarify and define certain rights and obligations with respect to the roads.

NOW THEREFORE, for and in consideration of the mutual covenants and benefits provided herein, the Parties agree to this Easement Amendment as follows.

The Parties agree that the rights conveyed by the Prior Easements identified on Exhibit A are hereafter subject to the following terms and conditions. Except as modified by this Easement Amendment, the terms of the Prior Easements shall continue in effect, provided that in the event of a conflict between the Prior Easements and this Easement Amendment, this Easement Amendment shall be controlling.

1. *Roads Affected.* This Easement Amendment applies to those roads described and identified in the Prior Easements.

2. *Road Uses.*

(a) Except as herein limited, Plum Creek shall have the right to use the roads described and identified in the Prior Easements for all purposes deemed necessary or desirable by Plum Creek for ingress and egress in connection with the protection, administration, management, and utilization of Plum Creek's lands or resources, including the use of the appurtenant land for forest management purposes, subdivision, sale or commercial, industrial, or residential

[redacted]

(b) The National Forest Roads and Trails Act of 1964 does not authorize the use of the

of-way area is not gullied, pitted, eroded, slumped or otherwise damaged or impaired beyond normal wear and tear.

(b) *On the Road System.* Where the authorized representative of the United States determines that user safety on the road system may be adversely affected by the number or location of road access points related to a change in use of Plum Creek's appurtenant lands, the authorized representative of the United States may reasonably prescribe the number or location of such road access points after good faith consultation with Plum Creek.

4. *Regulations and Closures.* The occupancy and use of the roads are subject to applicable state law and such federal statutes, regulations (*e.g.*, 36 C.F.R. Parts 212 & 261) and rules as the United States reasonably may impose including, but not limited to, traffic control, speed limits, vehicle size and weight, and emergency closures in the event of fire, flood, wind, or other natural disasters. The United States may designate public routes for winter recreation and other multiple-use activities and may impose reasonable restrictions to protect snow conditions on or near the roads designated as routes for use by over-snow vehicles and/or skiing. For a dual-use road involving both public winter recreation and other multiple-use activities, and ingress and egress by Plum Creek, the Parties shall address the allocation of costs and appropriate operation and maintenance standards in the plan provided for in Paragraph 6(c).

5. *Prohibitions.* Plum Creek shall not block, gate, or otherwise impede traffic or road use without written authorization by the United States, or take actions creating the appearance that a road is private and not open to general public use (such as signs declaring "private road" or "not open to public entry"). No signs shall be permitted within the easement area without prior authorization of the United States. The right to exclude the public from a road or roads lies solely with the United States. Except for emergency closures as described in Paragraph 4 above, the United States shall not block or gate a road in a manner that will preclude reasonable ingress and egress to Plum Creek's appurtenant lands.

6. *Road Maintenance and Reconstruction.*

(a) *In General.* All users of the roads are responsible for maintenance made necessary by their respective use of such roads and shall share in the upkeep and maintenance of the roads commensurate with the particular needs and uses of each user. For road-maintenance activities that benefit all users, the share to be borne by each user shall be proportionate to that user's total use of the road or roads being maintained. Unless a road has been incorporated into a public road system administered by a public road authority, the United States shall be responsible only for its proportionate share of road-maintenance costs as the United States deems necessary for National Forest System purposes. Plum Creek and its lessees, invitees, and agents, shall not be deemed members of the public for purposes of calculating proportionate use under the Prior Easements or this Easement Amendment.

(b) *Subdivision; Road Users Associations.*

(1) *Establishment of Road Users Associations.*

(A) The United States may, in its sole discretion, require the establishment of one or more road users associations by persons, existing road users associations, or, in the case of lands that have been subdivided, homeowners associations, to provide for performance or payment of construction, reconstruction, and maintenance costs, provide for other operational matters on roads within a common road system, and assume the obligations set forth in Paragraph 6(b)(1)(C). It is understood that the United States is not part of any such association.

(B) Such road users association ("Association") shall create legally binding covenants that run with the land which, at minimum, shall require that: (i) all owners of property appurtenant to such common road system, whether persons or members of a homeowners association, join the Association; (ii) the members of the Association abide by the terms and obligations contained in the Prior Easements and this Easement Amendment; and (iii) as to any other member, the members of such Association be entitled to costs, attorney fees, and interest at the highest legal rate in the event suit is brought against the Association or any of its members to enforce the road construction and maintenance terms as are provided for in the Prior Easements and this Easement Amendment. The rights of the United States shall not be impaired for the failure of an Association to abide by obligations required by this Paragraph.

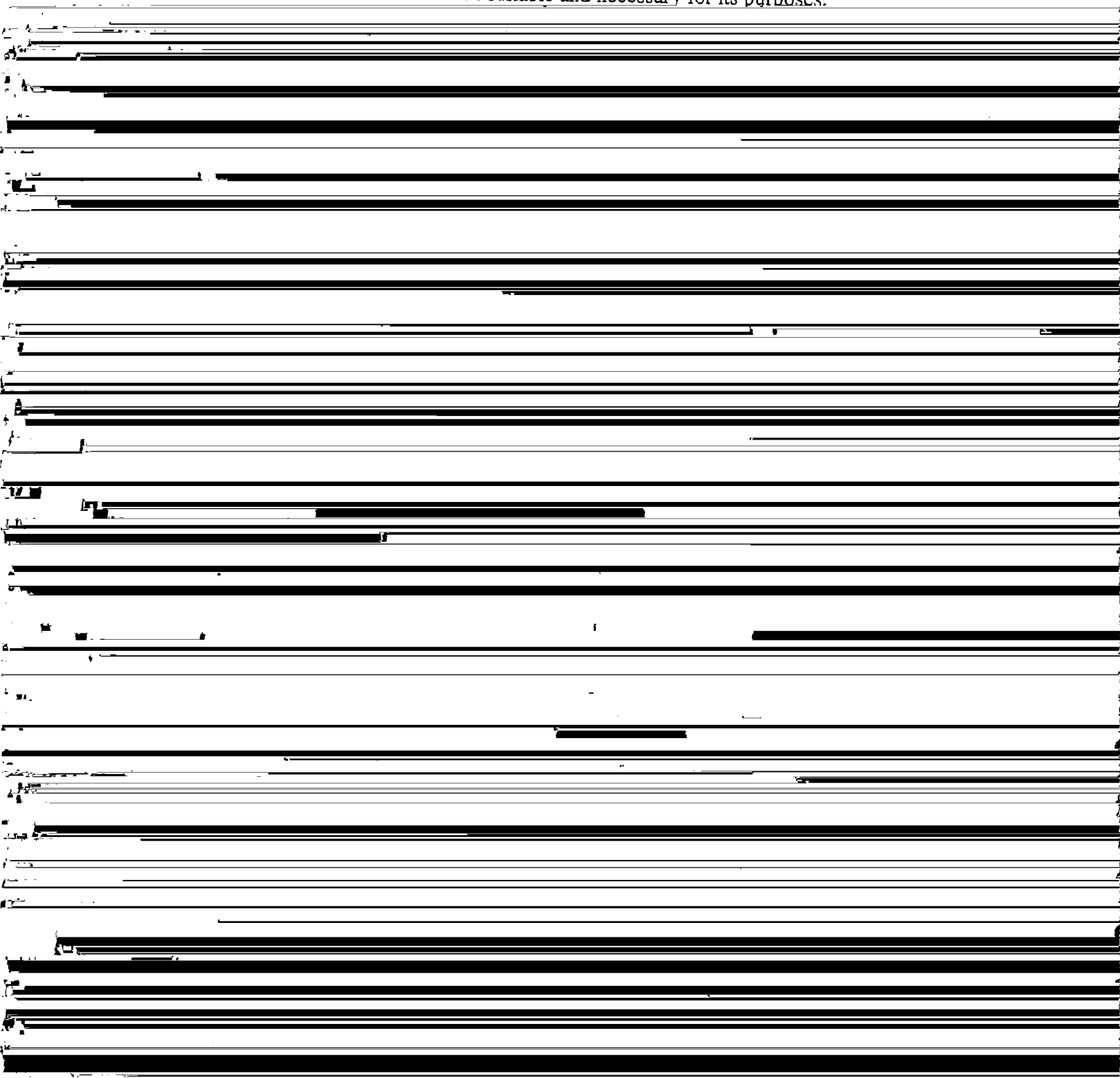
(C) The Association shall also ensure that the covenant required in Paragraph 7 is recorded and that all requirements of the covenant applicable to homeowners are implemented.

(D) Unless provided otherwise by written agreement of the Parties, in the event an Association terminates, or otherwise ceases to fulfill its obligations under the Prior Easements and this Easement Amendment constituting a default thereunder, such default or termination shall be deemed to begin a period of nonuse as that term is used in the Prior Easements. In the event of termination of an Association, the parties referenced in Paragraph 6(b)(1)(A) who had been that Association's members shall be jointly and severally liable to provide for performance or payment of such Association's construction, reconstruction, and maintenance obligations.

(E) So long as Plum Creek Timberlands, L.P. or any of its successors or assigns continues to manage its lands tributary to a cost-share road system as a Cooperator under a Road Rights-of-Way Construction and Use Agreement and/or Cooperative Road Maintenance Agreement with the United States, it shall not be required to form or be a member of any

subject to the Prior Easements and this Easement Amendment. In this event, the rights of Plum Creek under the Prior Easements and this Easement Amendment shall be deemed subordinated to the rights conveyed to the public road authority. Plum Creek shall, if requested by a public road authority, execute any additional instruments deemed necessary by such authority to subordinate any interest it may have in the roads, the Prior Easements, and this Easement Amendment.

(c) *Operation and Maintenance Standards*. A Party shall only be required to operate and maintain a road or roads to the lowest standard suitable and necessary for its purposes.



accordance with applicable state and federal laws and regulations pertaining to the use of pesticides and herbicides.

(2) *On Federal Lands.* Where the easement area crosses federal lands, Plum

[redacted]

Creek may maintain and control right-of-way vegetation by means of chemicals pursuant to approval granted it by the United States. In such case, Plum Creek shall seek approval from the United States in writing, specifying the time, method, chemicals, and precise section of the right-of-way that it proposes be chemically treated, and any approval of such request shall also be in writing. The United States shall not unreasonably delay or withhold action on the proposed use insofar as is consistent with existing laws and regulations.

(3) *On the Road System.* The United States may at any time maintain and control vegetation by means of chemicals on any portion of the road system right-of-way regardless of ownership insofar as such activities are in accordance with applicable federal laws and regulations.

(g) *Roadside Facilities.* All constructed roadside features and facilities, such as [redacted]

[redacted]

(e) For purposes of eliminating title or

7. If a Party retains the services of any contractor, such Party shall cause each contractor to maintain insurance coverages and limits of liability of the same type and amount as are required under this agreement.

(c) *Disclaimer by United States.*

(1) *In General.* The development of lands by Plum Creek shall not create any obligation, express or implied, on the part of the United States to provide fire protection, emergency services, or commercial services for the benefit of such lands or to regulate, operate, construct, or maintain the roads to accommodate access for such purposes.

(2) *Fire.* Nothing in this Easement Amendment obligates the United States to adopt any particular fire management regime, strategy, or methods for appurtenant public lands, or to provide fire protection or suppression for any development on Plum Creek's appurtenant lands.

9. *Successors.*

(a) *In General.* The terms of the Prior Easements and this Easement Amendment shall apply to all Parties. The Prior Easements and this Easement Amendment shall be deemed in gross as to the United States and as to any public road authority that is a successor or assign of the United States. The Prior Easements and this Easement Amendment shall be deemed appurtenant to, and the benefits and burdens shall run with, the lands owned as of the date of this Easement Amendment by Plum Creek, or to lands acquired by Plum Creek hereafter which are incorporated into an applicable Road Rights-of-Way Construction and Use Agreement and/or Cooperative Road Maintenance Agreement.

(b) *Disclosure to Prospective or Actual Purchasers.* Plum Creek shall disclose in clear, written terms to any prospective or actual purchaser or to any other person or entity taking title to property that is appurtenant to the Prior Easements as amended by this Easement Amendment the obligation to abide by the terms and conditions of the Prior Easements and this Easement Amendment including, without limitation, the obligation to contribute to costs associated with the ongoing construction, reconstruction, and maintenance of the roads.

(c) *Assignment.* Any Party may convey, in whole or in part, its rights under the Prior Easements and this Easement Amendment to one or more successors or assigns having land appurtenant to the roads, provided that thereafter any such successor or assign shall become a party to, and abide by the terms and conditions contained in, the Prior Easements and this Easement Amendment, including the obligation to bear a share of the road upkeep and maintenance costs commensurate to that Party's use of the roads; and provided further that upon the transfer by Plum Creek of any appurtenant lands hereto, Plum Creek shall be released from any further obligations hereunder with respect to the lands so transferred.

(d) *To Public Road Authorities and Third Parties.* The United States alone shall have the right to extend rights and privileges for use of the roads to a public road authority or to non-

appurtenant third parties (non-appurtenant third parties being parties without privity with Plum

PLUM CREEK TIMBERLANDS, L.P.
By Plum Creek Timber I, L.L.C., its general partner

By_____
Its_____

PLUM CREEK LAND COMPANY
By: _____
Its: _____

Acknowledgments

State of Montana,

County of Missoula, s.s.

The foregoing instrument was acknowledged before me by _____, authorized official of the United States of America, this _____day of _____, 2008.

Witness my hand and official seal.

_____
Notary Public

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

On this _____ day of _____, 2008, before me personally appeared _____ to me known to be the _____ of Plum Creek Timber I, L.L.C., general partner of Plum Creek Timberlands, L.P., the limited partnership that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said limited partnership for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument on behalf of the limited partnership and that the seal affixed is the seal of said limited partnership.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year last above written.

_____
Notary Public in and for the
State of Washington
Residing at _____
My Commission Expires _____
Printed Name _____

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

On this _____ day of _____, 2008, before me personally appeared _____ to me known to be the _____ of Plum Creek Land Company, the corporation that executed the within and foregoing instrument

"Jennings, Matt (Tester)"
<Matt_Jennings@tester.senate.gov>
04/18/2008 05:06 PM

To <james.snow@usda.gov>, <gsmith08@fs.fed.us>
cc <mark.rey@usda.gov>
bcc
Subject Plum Creek prior easement agreements and NEPA documents

Jim and Greg, I was hoping that I could see copies of the prior easement agreements with Plum Creek or their predecessors (i.e. Champion or BN) to compare the proposed clarification. I am also interested in seeing copies of the original NEPA documents for these roads. I understand this might be a mountain of paperwork, so some sort of initial sampling would be helpful.

Thank you.

Matt Jennings
Legislative Assistant
Energy and Natural Resources
Office of Senator Tester
(202) 228-6277

April 9, 2008

Questions & Answers
Regarding Cost Share Roads between Plum Creek and USDA Forest Service

Forest Service (FS) language in pre 1994 easement deeds contained language that is very broad and may not reasonably be restricted to Timber and Forest Management. Unlike under Forest Land Policy and Management Act (FLPMA) easements, under the older cost share easements that are assignable, we do not have the ability to go back and require the landowners to form a road user's association that is a single legal entity for us to deal with. Instead we have to deal with multiple individual landowners. This is problematic when it comes to road maintenance. We can and do require users of the road to maintain it proportionate to their use. The cost share easements also require it, however when it comes to multiple landowners using a road under the cost share easement for residential purposes, it is nearly impossible to determine what each party's proportionate use. It is not practical for multiple individual parties to perform their proportionate share of the maintenance need, and thus one party needs to perform the work and the other parties deposit funds to cover their share with the party doing the work. This is very impractical for the FS to administer since we would become the mediator between all of the parties on disagreements. If the FS is performing the maintenance, we can only expend appropriated funds to perform maintenance needed for National Forest management needs and not private property use needs.

The following answers in **bold**, is in response to questions from Senator Tester:

1. How many miles of cost share roads do we have in the nation?
   There are 20,000 - 25,000 miles of cost share roads

2. What States? **Montana, Idaho, Washington, Oregon, California, Alaska and Arkansas**

3. How many miles in Montana? **4500 - 5000 miles for all cost share cooperators (approximately 4,500 miles with Plum Creek)**

4. What forests in Montana are subject to cost share systems with Plum Creek? **The Lolo, Flathead, Kootenai National Forests**

5. How much land does PC own in Montana? **It is estimated that PC owns approximately 1 million acres.**

6. How much money changes hands between the FS and PC pursuant to cost share agreements? **(see below)**

The National Forest Roads and Trails Act (FRTA) provides authority to develop and maintain roads and road systems through cooperative financing. This can occur in ways other than exchanging money (cash). The most common approach is to carry balances and to offset debits and credits by future road work. Consequently it is not routine for actual money transactions to

occur on a year to year basis. If balances get too far out of balance then other forms of amortization, such as timber sale collection rights, are implemented to bring debits and credits back into balance.

The share of estimated construction costs to be borne by each party for each jointly financed road under a cost share agreement, whether the road is already constructed or is to be constructed, may be amortized by any one or a combination of the following methods:

- By a party's performing or having performed construction or reconstruction on the jointly financed road to the extent of its share.

[redacted]

Tom Suk/R1/USDAFS
09/20/2006 11:01 AM

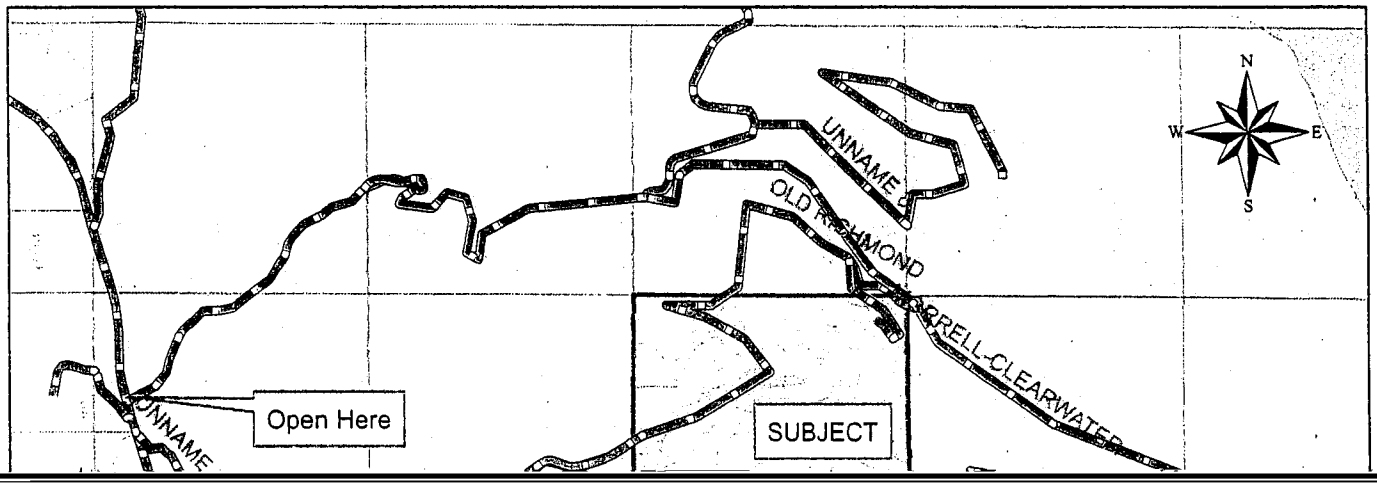
To A L Richard/WO/USDAFS@FSNOTES
cc
bcc
Subject Plum Creek Sales

Attached a map that I got from the perspective purchaser of the Plum Creek property we talked about. I have also faxed a copy of the the US to BNI easement covering this road, it has an attached map exhibit as well.

Thomas S. Suk
WO Lands Staff
USDA-Forest Service
PO Box 7669
Missoula, MT 59807
(Voice) 406-329-3613
(Cell) 406-210-3603
(Fax) 406-329-3198

Section 5, T18N, R15W Access Plan

Condon, Missoula County, Montana



Authorization ID _____

Contact ID _____

Expiration Date:

FS-2700-9d (9/96)

OMB No. 0596-0082

U. S. DEPARTMENT OF AGRICULTURE
Forest Service
COST SHARE EASEMENT
National Forest Roads and Trails
Act, October 13, 1964, (P. L. 88-657)
36 CFR 251.50, et seq

THIS EASEMENT, dated this __ day of _____(Month/Year), from the United States of America, acting by and through the Forest Service, Department of Agriculture, hereinafter called Grantor, to _____(Holder Name), a _____(Person/Corporation/Other Entity) of the State of _____(Name), hereinafter called Grantee.

WITNESSETH:

WHEREAS, Grantee has applied for a grant of an easement under the Act of October 13, 1964 (78 Stat. 1089; 16 U.S.C. 532-538), for a road over [redacted]

A. Except as hereinafter limited, Grantee shall have the right to use the road on the premises without cost for all purposes deemed necessary or desirable by Grantee in connection with the protection, administration, management, and utilization of Grantee's lands or resources, now or hereafter owned or controlled, subject to such traffic-control regulations and rules as Grantor reasonably may impose upon or require of other users of the road without reducing the rights herein granted:

Provided, however, That any timber or other materials hauled by the Grantee from lands now owned by third parties in the agreement area as shown on exhibit __, attached hereto, shall be treated as though hauled by someone else. Grantee shall have the right to construct, reconstruct, and maintain roads within the premises.

Grantee's right to use the road shall include, but shall not be limited to, use for the purpose of operating and moving specialized logging vehicles and other equipment subject to the following limitations:

Subject to compliance with legal dimensions and weights of motor vehicles imposed by State law on comparable public roads and highways: Provided, That gross weights of equipment or vehicles shall not exceed the capacity of bridges and other structures, and Provided further, That cleated equipment shall not be used on paved roads. 2/

B. Grantee shall comply with all applicable State and Federal laws, Executive orders, and Federal rules and regulations, except that no present or future administrative rules or regulations shall reduce the rights herein expressly granted.

C. Grantee shall have the right to charge and to enforce collections from purchasers of timber or other materials when removed from Grantor's lands (within the agreement area shown on exhibit _____) 3/ over the road at such rate per unit of material hauled, or at such higher rate as may be approved by the Regional Forester, as set forth in ____(name/title) Road Right-of-Way Construction and Use Agreement dated _____(Insert Date), until such time as the amounts paid by such means or by credits received from Grantor shall total the amount set forth in said agreement. Timber or other materials hauled by Grantee from lands of the Grantor shall be regarded as though hauled by someone else.

D. Grantee shall have the right to cut timber upon the premises to the extent necessary for constructing, reconstructing, and maintaining the road. Timber so cut shall, unless otherwise agreed to, be cut into logs of lengths specified by the timber owner and decked along the road for disposal by the owner of such

E. The costs of road maintenance shall be allocated on the basis of respective uses of the road.

During the periods when either party uses the road or Grantor permits use of the road by others for hauling of timber or other materials, the party so using or permitting such use shall perform or cause to be performed, or contribute or cause to be contributed that share of maintenance occasioned by such use of the road.

On any road maintained by Grantee, Grantee shall have the right to charge purchasers of National Forest timber and other commercial haulers, or to recover from available deposits held by the Grantor for such purchasers or haulers, reasonable maintenance charges based on the ratio that said hauling bears to the total hauling on such road. Grantor shall prohibit noncommercial use unless provision is made by Grantor or by the noncommercial users to bear proportionate maintenance costs.

F. Grantee shall have the right to require any user of the road for commercial or heavy hauling purposes to post security guaranteeing performance of such user's obligations with respect to maintenance of the road and with respect to payments of any charges hereinabove stated as payable to Grantee for use of the road: Provided, That the amount of such security shall be limited to the amount reasonably necessary to secure such payment as approved by the Regional Forester.

G. If it is customary in the industry in this locality to require liability insurance at the time commercial users are allowed to use the road, the Grantee shall have the right to require any user of the road for commercial hauling to procure, to maintain, and to furnish satisfactory evidence of liability insurance in a form generally acceptable in the trade and customary in this area, insuring said party against liability arising out of its operation on the premises. The amount of the insurance that may be required shall be established by the Grantor based on the amount customarily carried by commercial haulers in this area.

H. The Grantee shall maintain the right-of-way clearing by means of chemicals only after the Forest Supervisor has given specific written approval. Application for such approval must be in writing and must specify the time, method, chemicals, and the exact portion of the right-of-way to be chemically treated.

I. The rights herein conveyed do not include the right to use the road for access to developments used for short or long-term residential purposes, unless and until traffic control regulations, rules, and other provisions to accommodate such use of the road are agreed upon by the Grantor and Grantee.

This easement is granted subject to the following reservations by Grantor, for itself, its permittees, contractors, and assignees:

1. The right to use the road for all purposes deemed necessary or desirable by Grantor in connection with the protection, administration, management, and utilization of Grantor's lands or resources, now or hereafter owned or controlled, subject to the limitations herein contained, and subject to such traffic-control regulations and rules as Grantor may reasonably impose upon or require of other users of the road without reducing the rights herein granted to Grantee: Provided, That all use by the public for purposes of access to or from Grantor's lands shall be controlled by Grantor so as not unreasonably to interfere with use of the road by Grantee or to cause the Grantee to bear a share of the cost of maintenance greater than Grantee's use bears to all use of the road.

2. The right alone to extend rights and privileges for use of the premises to other Government departments and agencies, States, and local subdivisions thereof, and to other users including members of the public except users of lands or resources owned or controlled by Grantee or its successors: Provided,

   That such additional use also shall be controlled by Grantor so as not unreasonably to interfere with use of the road by Grantee or to cause Grantee to bear a share of the cost of maintenance greater than Grantee's use bears to all use of the road.

3. The right to cross and recross the premises and road at any place by any reasonable means and for any purpose in such manner as will not interfere unreasonably with use of the road.

4. The right to all timber now or hereafter growing on the premises, subject to Grantee's right to cut such timber as hereinbefore provided.

USER NOTE: USE THE FOLLOWING IF APPLICABLE.
Delete instructions and the following if not applicable.

[redacted]

UNITED STATES OF AMERICA

_____
<Title>
Forest Service
Department of Agriculture

(APPROPRIATE ACKNOWLEDGMENT)

1/ Omit the word(s) in parentheses if not applicable.

2/ See FSH 5409.17, section 63.12, for wording to authorize loads in excess of highway loadings. Add any additional wording at end of authorization form, prior to signature of authorized officer.

3/ Include words in parentheses only when the easement also includes a collection right applicable to outside timber.

[redacted]

Nadine Gaddy /WO/USDAFS
01/31/2007 06:59 PM

To A L Richard/WO/USDAFS@FSNOTES
cc
bcc
Subject Fw: Meeting confirmation: Re: Plum Creek, February 7 @ 2:00 pm in Room 217E Whitten Bldg

EF
2 pgs

"David.Tenny@usda.gov"
<David.Tenny@usda.gov>
01/30/2007 04:48 PM

To "MaryE.McCormick@usda.gov" <MaryE.McCormick@usda.gov>, "JAMES.SNOW@OGC.USDA.GOV" <JAMES.SNOW@OGC.USDA.GOV>, "JAN.POLING@OGC.USDA.GOV" <JAN.POLING@OGC.USDA.GOV>, "gsmith08@fs.fed.us" <gsmith08@fs.fed.us>
cc "ngaddy@fs.fed.us" <ngaddy@fs.fed.us>

[redacted]

Mary McCormick
Phone: 202-720-5166
e-mail: marye.mccormick@usda.gov